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In the Supreme Court of the United States

OCTOBER TERM, 1975

L. C. COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that hearsay evidence was erroneously admitted to link him with the conspiracy charged, that the trial court should have permitted a co-defendant to give exculpatory testimony without waiving his privilege against self-incrimination, that the trial court erred in refusing to grant him a separate trial, and that the court abused its discretion in allowing the twenty-four co-defendants a total of twenty-four peremptory juror challenges.

After a jury trial with 23 co-defendants in the United States District Court for the Western District of Kentucky, petitioner was convicted of having conspired[1] to transport,

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[1]The indictment named an additional thirteen persons as unindicted co-conspirators.

receive, conceal, store, barter, sell and dispose of stolen motor vehicles moving in interstate commerce, in violation of 18 U.S.C. 371, 2312, and 2313.[2] He was sentenced to imprisonment for two years and fined $5,000. The court of appeals affirmed (512 F.2d 637). (On June 16, 1975, this Court denied co-defendants' petition for a writ of certiorari (*Billy Mayes, et. al.* v. *United States*, No. 74-1224).)

The facts are adequately set forth in the opinion of the court of appeals and may be summarized as follows. Petitioner and others (some of whom testified for the government at trial) were part of a conspiracy to steal or arrange for the theft of automobiles in a ten-state area. The conspirators would steal automobiles and switch the ownership papers of the stolen cars with those of wrecked automobiles, transferring the registration papers and other vehicle identification from the wrecked to the stolen automobiles.[3] The stolen automobiles, now carrying impeccable credentials, would be driven to other states and sold to unsuspecting buyers. The evidence at trial indicated that as many as 1,800 vehicles may have been stolen during the course of the conspiracy. (Pet. App. 5a-6a.)

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[2]Eighteen co-defendants (Billy Mayes, William Hudson, Shirley Basham, Fred Tabor, Jimmy Thompson, Hubert Harrison, William Houk, Nathan McDaniel, Larry Gann, Larry Suddeth, James Dennison, James Hendricks, Carroll Pemberton, Lewis Bewley, Larry Osborne, Ernest Fowler, Chester Crawley, and James Newberry) were also convicted as charged. Three defendants (Billy Miller, Charles Adams, and Ronald Kinser) were acquitted by the jury. Charlotte Mayes was acquitted by the court at the close of the government's case. William Barbee pleaded guilty during the trial. Two defendants were fugitives at the time of trial.

[3]The conspirators took advantage of the decentralized Kentucky registration system, under which registration certificates are issued by 35 different county clerks' offices. Papers of wrecked automobiles, as well as forged papers purportedly issued in other states, were presented to county clerks to obtain new and seemingly valid papers matching the numbers and descriptions of the stolen vehicles. The conspirators moved from clerk's office to clerk's office and appeared at rush hours to decrease any chance of detection. (Pet. App. 5a-6a.)

The conspiracy was carried out under the overall direction of co-defendants Mayes, Basham, and Hudson. Defendants Houk, Gann and others were the car thieves; Dennison and Fowler transported the stolen cars to other states; Harrison, Hudson and Dennison altered the identification numbers on the stolen vehicles; Hendricks and Osborne made out the fictitious title certificates for the stolen vehicles; petitioner and Bewley received the cars prior to their disposal; and Hudson, Basham, Newberry, Crawley, Hendricks, Pemberton, Fowler, Thompson, and Suddeth sold the stolen cars to innocent consumers or used car dealers in other states.

The government's proof directly linked petitioner with two of the stolen vehicles. A 1969 Chevrolet pick-up truck, which had been stolen in Indianapolis, Indiana, was subsequently discovered in petitioner's possession in Louisville, Kentucky, with an altered serial number plate, and with a new motor number that petitioner had installed and that further disguised the vehicle's true indentity (Tr. 2325-2326, 2329, 6755). Petitioner testified that he had bought the truck for $1,490 in cash from a total stranger whom he never saw again and who did not give him a receipt (Tr. 6810). Max Bayer, an unindicted co-conspirator, testified that he overheard petitioner and defendants Basham and Hudson discussing stolen pick-up trucks in a restaurant in Bowling Green, Kentucky (Tr. 1693, 1695, 1697-1698).

The second stolen vehicle tied to petitioner was a 1970 Chevrolet automobile. The government presented evidence that permitted the jury to infer that petitioner placed an "order" for the Chevrolet to be stolen, registered and insured the stolen car in his sister's name, obtained $2,700 by using it as collateral for a loan, and arranged for it to be restolen.

The car was originally stolen in Louisville by co-conspirator C. W. Marcum and delivered in Bowling Green to defendant Billy Mayes, on whose instructions Marcum was acting (Tr. 2687-2690, 2702-2705). Co-conspirator Barry Clayton testified that Mayes told him that petitioner had "ordered" the car stolen for purposes of insurance fraud and wanted it restolen by Mayes and his confederates (Tr. 2820-2821).

Defendant Harrison altered the Chevrolet's vehicle identification number, using the number from a wrecked car (Tr. 2817). Clayton and defendant Dennison then drove the stolen car to a location in Bowling Green, following Mayes in his own car. Mayes then drove the stolen Chevrolet away, while Clayton and Dennison waited in Mayes' car (Tr. 2818). Mayes returned in another car driven by petitioner (Tr. 2827-2828, 2837-2839).

Petitioner subsequently co-signed with his sister a $2,700 bank note for which the stolen car was used as collateral (Tr. 2788). As prearranged, Clayton and Dennison later restole the vehicle (Tr. 2823-2824). After the theft was reported, the insurance company paid off the bank loan (Tr. 2788-2791). The conspirators dismantled the Chevrolet and converted it to salvage (Tr. 2824-2825). Their purpose in restealing and disassembling the car was to prevent discovery of its stolen origin (Tr. 905-906).

1. Clayton's testimony that Billy Mayes told him that petitioner had "ordered" the Chevrolet stolen was properly received into evidence under the exception to the hearsay rule for declarations by co-conspirators acting in furtherance of a conspiracy. See, *e.g.*, *Krulewitch* v. *United States*, 336 U.S. 440. As the court of appeals held (Pet. App. 17a):

> * * * [A] prima facie case of the conspiracy and the defendant's connection with it must be established by evidence independent of that offered as an admission of a co-conspirator.
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> * * * * *
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> While the hearsay evidence contained in Barry Lynn Clayton's testimony was relevant to the ultimate issue of whether defendant Cook had participated in the conspiracy, it was not the only evidence of that participation. Upon a review of the record, we conclude that the necessary prima facie case had been made by the government independent of Clayton's testimony. The admission of the challenged evidence was, therefore, proper.

Petitioner sought unsuccessfully to call co-defendant Mayes as a defense witness to refute Clayton's testimony about Mayes' remarks implicating petitioner. Counsel for Mayes told the court that Mayes would be willing to testify for that limited purpose if he could do so without waiving his Fifth Amendment right not to respond to questioning on cross-examination (Tr. 6639-6645). Petitioner argues (Pet. 17-18) that his Sixth Amendment right to confront Mayes was abridged when the trial court sustained the government's objection to such a limitation of the prosecution's right to cross-examine and Mayes consequently refused to testify.

The court of appeals (Pet. App. 14a, n. 5) properly rejected that contention. Petitioner cites no precedent for such a procedure, which would permit co-defendants to testify in each other's behalf without subjecting themselves to the full truth-testing rigors of cross-examination. The trial judge could not have fairly permitted Mayes to take the stand and deny his acquaintance with petitioner without allowing the government to cross-examine him regarding all aspects of his involvement in the conspiracy.

In effect, petitioner contends that admission of hearsay declarations of co-defendants in joint trials violates the Confrontation Clause of the Sixth Amendment where the co-defendant-declarant refuses to testify on Fifth Amendment grounds. However, the exception to the hearsay rule for declarations of co-conspirators made in furtherance of a conspiracy and the applicability of the exception in joint trials have long been recognized by this Court.[4] See, *e.g., Krulewitch, supra*; *United States* v. *Nixon*, 418 U.S. 683, 701. Indeed, conspiracy trials by their very nature involve multiple defendants, and the admission into evidence of hearsay declarations by co-defendants who decline to take the stand in their own defense routinely occurs. *Douglas* v. *Alabama*, 380 U.S. 415, cited by petitioner, is not in point since it involved the introduction into evidence of a co-defendant's *confession*—not a hearsay declaration by a co-defendant acting in furtherance of a conspiracy.

2. Petitioner asserts that because his involvement in the conspiracy was peripheral, the trial court erred in refusing to grant his pretrial motion for a separate trial. The decision whether to grant a severance lies within the sound discretion of the trial court and, as the court of appeals held (Pet. App. 13a), petitioner was not unduly prejudiced by the joint trial. As the court of appeals noted (Pet. App. 13a-14a), "the trial court did sever the conspiracy trial from the substantive auto theft charges as to all defendants" and "[w]hether the trials were joint or separate, the government could prove the entire scope of the conspiracy, though one defendant's role in it was limited."

Additionally, petitioner now suggests (Pet. 18) that the trial court should have granted a severance to permit him to call co-defendant Billy Mayes as a witness. But there is

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[4]This principle is codified in Rule 801(d)(2)(E) of the Federal Rules of Evidence.

no reason to assume that a severance would have enabled petitioner to obtain Mayes' testimony, since Mayes would presumably have continued to invoke his privilege against self-incrimination.

3. Under Rule 24(b), Fed. R. Crim. P., a defendant or defendants are entitled to a total of ten peremptory juror challenges in a non-capital case. The Rule further provides that "[i]f there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly." Here the trial judge, in his discretion, granted fourteen additional challenges, which allowed the twenty-four defendants a total of twenty-four challenges. As recounted in the opinion of the court of appeals (Pet. App. 11a), the method employed in exercising the peremptory challenges was somewhat informal. Most were exercised separately following a conference of defense counsel. When the number of challenges was reduced to three, counsel agreed to exercise those remaining in a joint manner.

Petitioner claims that because the number of challenges equaled the number of defendants he was unfairly limited to a single peremptory strike. However, as the court of appeals held (Pet. App. 11a-12a), "[i]n the selection of jurors, the district court is accorded a wide latitude of discretion" and "the trial judge did not abuse his discretion in the application of Rule 24(b) in this case." Indeed, the defendants received more than twice the minimum of ten challenges they were entitled to under Rule 24.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5]On the other hand, the prosecution was granted only six peremptory challenges.